No. 91-1393

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

A. L. LOCKHART, Director
Arkansas Department of Correction,
Petitioner,

v.

BOBBY RAY FRETWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

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On September 18, 1992, respondent Fretwell filed his brief on the merits in the above-styled case. Also, on that same day, *amici curiae* filed a brief in support of respondent Fretwell's position. Petitioner Lockhart wishes to reply to the Eighth Amendment "genuine narrowing" argument made by respondent Fretwell in his brief and by Fretwell's *amici* in their brief.

I. THE DEFINITION OF FELONY-MURDER SET FORTH IN ARKANSAS STATUTE ANNOTATED § 41-1501(1)(a) (1977) GENUINELY NARROWS THE SET OF ALL MURDERERS INTO A SUBSET OF CERTAIN FELONY-MURDERERS THAT TRULY DESERVES TO DIE.

A. Introduction.

Both respondent Fretwell and the *amici curiae* who support his position argue in their briefs that the United States Eighth Circuit Court of Appeals erred in holding

in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989) that its previous "double-counting" holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985) was effectively overruled by this Court's holding in *Lowenfield v. Phelps*, 484 U.S. 231, 241-46 (1988), that Louisiana's death penalty sentencing procedure satisfied the Eighth Amendment's requirement of genuine narrowing by narrowly defining the offense of capital murder. According to Fretwell and his *amici curiae*, the statutory death penalty sentencing procedure in Arkansas is so different from that in Louisiana that the Eighth Circuit Court of Appeals erred in concluding in *Perry* that *Lowenfield* was authority for the proposition that Arkansas' death penalty sentencing procedure performed the genuine narrowing required by the Eighth Amendment at the definitional stage of capital murder. Petitioner Lockhart disagrees. Both Fretwell and his *amici curiae* are wrong when they contend that Arkansas' death penalty sentencing procedure does not perform the requisite genuine narrowing at the definitional stage of capital murder, given Arkansas' narrow definition of capital felony murder. Lockhart makes this argument only with regard to the definition of capital felony murder, which is the type of capital murder at issue in the instant case. As will be noted in subsection C, *infra*, Arkansas' present definition of capital murder as "premeditated and deliberated" murder does not perform the requisite genuine narrowing at the definitional stage of capital murder. As will be noted in subsection C, *infra*, as of 1989, when killing a single victim with premeditation and deliberation became a capital offense in Arkansas, the requisite genuine narrowing for such murderers occurs in the penalty stage of Arkansas' death penalty sentencing procedure.

Lockhart concedes that the issue of whether Arkansas' definition of capital felony murder performs the requisite genuine narrowing is properly before this Court as part of Fretwell's Sixth Amendment claim of deprivation of

his right to the effective assistance of counsel at the penalty phase of his capital felony murder trial. Fretwell raised this issue in his brief to the Eighth Circuit Court of Appeals. Fretwell's brief to the Eighth Circuit Court of Appeals at 5-9. In its *Fretwell* opinion the Court of Appeals noted that any challenge that Fretwell would have made to the validity of Arkansas' death penalty sentencing procedure on the basis that it failed to perform the genuine narrowing required by the Eighth Amendment ". . . would fail under a retroactive application of *Lowenfield*." *Fretwell*, 946 F.2d at 577 n.8. Lockhart specifically waives any procedural bar-type arguments based on this Court's holding in *Wainwright v. Sykes*, 433 U.S. 72 (1977) to this Court's addressing, either as a Sixth Amendment issue or as an Eighth Amendment issue, whether Arkansas' definition of capital felony murder performs the genuine narrowing required by the Eighth Amendment.

B. Arkansas' Death Penalty Sentencing Procedure Does Not Define All Felony Murder as Capital Felony Murder and in 1985 in Arkansas Only Seven Types of Felony Murder Were Considered Capital Felony Murder.

Lockhart submits that one way in which Arkansas' capital punishment sentencing procedure genuinely narrows the class of all murderers into a subclass of those that truly deserves to die is by limiting its definitions of capital felony murder.[1] In Arkansas in 1985 when Fretwell committed the robbery-murder at issue, the definition of capital felony murder was set forth in Arkansas Stat-

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[1] The "genuine narrowing" required by the Eighth Amendment requires of a state's death penalty sentencing procedure that it narrow the set of all murderers into a subset that truly deserves to die. *See Zant v. Stephens*, 462 U.S. 862, 877 n.15 (1983) and *Godfrey v. Georgia*, 446 U.S. 420 (1980).

ute Annotated § 41-1501(1)(a) (1977).[2] Section 41-1501 (1)(a) limits the definition of capital felony murder to killings that are committed in the course of rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree. Fretwell was convicted of one of these capital felony murders, robbery-murder. It is simply not true, as Fretwell and his *amici curiae* suggest, that Arkansas defines all felony murder as capital felony murder. In 1985, if a defendant caused the death of another human being in the course of committing a felony and that felony was not one of the seven felonies listed in § 41-1501 (1)(a), then the defendant could not have been convicted of capital felony murder and, therefore, would not have been eligible for the death penalty.

Admittedly, such cases were rare in 1985 and are rare today under Arkansas' present definition of capital felony murder.[3] However, in 1989 the Arkansas Supreme Court affirmed a first degree felony murder conviction where the defendant had caused the death of another person in the course of committing the felony offense of theft by receiving, *Hall v. State*, 299 Ark. 209, 772 S.W.2d 317 (1989). In *Hall* the defendant committed the felony offense of theft by receiving by having received and having retained

[2] Arkansas Statute Annotated § 41-1501(1)(a) (1977) states:

"A person commits capital murder if:

acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtheranec of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. . . ." [Arkansas Statute Annotated § 41-1501(1)(a) is presently codified as Arkansas Code Annotated § 5-10-101(a)(1) (Supp. 1991).]

[3] Arkansas' present definition of capital felony murder, codified as Arkansas Code Annotated § 5-10-101(a)(1) (Supp. 1991), is the same as the definition of capital felony murder set forth in § 41-1501(1)(a) (1977) except that the present definition of capital felony murder adds the predicate felony offense of delivery of a controlled substance.

possesesion of a stolen automobile. In *Hall* the defendant killed another person in the course of committing theft by receiving by running over a bystander as he fled in the stolen automobile from the police. This decision by the Arkansas Supreme Court demonstrates that Arkansas' capital punishment sentencing procedures does narrow the set of all murderers into a subset by excluding some types of felony murder from the definition of capital murder.

C. The Attendant Circumstance Set Forth in Arkansas Statute Annotated § 41-1501(1)(a) (1977) of ". . . Under Circumstances Manifesting Extreme Indifference to the Value of Human Life . . ." Has Been Interpreted by the Arkansas Supreme Court to Be the Equivalent of the Culpable Mental State of Intent.

Lockhart submits that Arkansas' capital punishment sentencing procedure as it existed in 1985 and as it exists today performs the requisite genuine narrowing of the set of all murderers into a subset that truly deserves to die because Arkansas' definition of capital felony murder includes the attendant circumstance of "under circumstances manifesting extreme indifference to the value of human life" and the Arkansas Supreme Court has interpreted this attendant circumstance to be the equivalent of the culpable mental state of intent. Both Fretwell and his *amicus curiae* argue in their brief that Arkansas failed to narrow its definition of capital felony murder in response to this Court's landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972). This assertion by Fretwell and his *amici curiae* is wrong.

- Prior to *Furman*, capital murder in Arkansas was defined in Arkansas Statute Annotated § 41-205 (Repl. 1964) as follows:

> All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or

> in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree.

In 1975, three years after this Court's decision in *Furman*, Arkansas narrowed the definition of capital felony murder by reformulating the offense into the form it has in Arkansas Statute Annotated § 41-1501(1)(a). Specifically, Arkansas narrowed its definition of capital felony murder by adding the attendant circumstances of ". . . under circumstances manifesting extreme indifference to the value of human life. . . ." Both Fretwell and his *amicus curiae* assert that this attendant circumstance amounts to nothing more than the culpable mental state of "recklessly" and that all felony murderers occur "under circumstances manifesting extreme indifference to the value of human life." (Fretwell's brief at 25-26 and Fretwell's *amici curiae* brief at 15; 19-20) This assertion by Fretwell and his *amici curiae* is incorrect. The Arkansas Supreme Court has interpreted the attendant circumstance "under circumstances manifesting extreme indifference to the value of human life" set forth in the statutory definition of first degree battery as being the equivalent of the culpable mental state of intent. The Arkansas Supreme Court has so held in the cases of *Nolen v. State*, 278 Ark. 17, 21-2, 643 S.W.2d 257, 259-60 (1982) and *State v. Vowell*, 276 Ark. 258, 634, S.W.2d 118 (1982). Both *Nolen* and *Vowell* involved defendants who, while driving while intoxicated, caused automobile crashes, thereby causing injury to other persons. Although neither *Nolen* nor *Vowell* were cases involving a charge of felony murder, in both cases the Arkansas Supreme Court stated that it considered the attendant circumstance "under circumstances manifesting extreme indifference to the value of human life" to be in the nature of a culpable mental state and to be akin to intentional conduct. The limitation imposed on the definition of capital felony murder by the Arkansas Supreme Court's interpretation in *Nolen* and *Vowell* of the attendant circumstance "under circumstances manifesting extreme indifference to the value of human life" distinguishes Arkansas' capital punishment sentencing procedure from that in other jurisdictions, notably Tennessee and Wyoming. Fretwell and his *amicus curiae* rely on recent state supreme court decisions from these two states to buttress their contention that Arkansas' capital punishment sentencing procedure does not perform the requisite genuine narrowing.

The state supreme court decisions that Fretwell and his *amicus curiae* rely on are the decisions by the Tennessee Supreme Court in *State v. Middlebrooks*, No. 01-S-01-9102-CR-00008 (Tenn. Sept. 8, 1992) and by the Wyoming Supreme Court in *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991). The definitions of capital felony murder at issue in *Middlebrooks* and *Engberg* did not have the attendant circumstance of "under circumstances manifesting extreme indifference to the value of human life," much less an interpretation of that attendant circumstance that treated it as the equivalent of the culpable mental state of intent. The definition of capital felony murder at issue in *Middlebrooks* defined the offense, in pertinent part, as, "[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb." *Middlebrooks*, slip op. at 37-8. The definition of capital robbery murder at issue in *Engberg* defined the offense as, "[w]hoever . . . in the perpetration of, or attempt to perpetrate, any . . . robbery . . . kills any human being . . . is guilty of murder in the first degree. *Engberg*, 820 P.2d at 87. Given the interpretation of the attendant circumstance, "under circumstances manifesting extreme indifference to the value of human life" by the Arkansas Supreme Court in *Nolen* and *Vowell*, Arkansas' definition of capital felony murder is substantially narrower than the definition of capital felony murder at issue in *Middlebrooks* and at issue in *Engberg*.

Lockhart notes that Fretwell's *amici curiae* cite the *Middlebrooks* decision and seem to assert in their brief that just because a state's definition of capital felony murder meets the standard set forth by this Court in *Tison v. Arizona*, 481 U.S. 137 (1987), that definition of capital felony murder does not necessarily perform the genuine narrowing required by the Eighth Amendment. Fretwell's *amici curiae* brief at 15 (citing *Middlebrooks*, slip op. at 63). This contention by Fretwell's *amici curiae* and the decision by the Tennessee Supreme Court in *Middlebrooks* are in error. This Court's decision in *Tison* does not directly address the "genuine narrowing" issue posed in the instant case, but instead addresses the issue of whether the death penalty is permitted by the Eighth Amendment as a proportional punishment for certain kinds of felony murder. In *Tison* this Court held that the Eighth Amendment prohibits the imposition of the death penalty on the defendant in a capital felony murder case unless the state proves that the defendant killed the victim or intended that the victim be killed or acted with reckless indifference to the possibility of the victim's death. The Arkansas Supreme Court has specifically held that Arkansas' definition of capital felony murder meets the *Tison* standard. *Burnett v. State*, 295 Ark. 401, 411-12, 749 S.W.2d 308, 314 (1988). Lockhart submits that if a state's definition of capital felony murder meets the *Tison* standard, then that definition of capital felony murder must also perform the genuine narrowing required by the Eighth Amendment. If death is a proportional punishment, in Eighth Amendment terms, for a particular type felony murder, then the definition of felony murder at issue must genuinely narrow the class of all murderers into a subset that truly deserves to die. The Eighth Amendment does not require, as the Tennessee Supreme Court holds in *Middlebrooks*, that a statutory definition of capital felony murder genuinely narrow the set of all felony murders who meet the *Tison* standard into a smaller subset of felony murderers—all that the Eighth Amendment requires of states that perform the required genuine narrowing at the definitional stage of capital felony murder is that the definition of capital felony murder genuinely narrow the set of all murderers into a subset that truly deserves to die. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983) (a state's capital sentencing procedure ". . . must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

Lockhart notes also that Fretwell's *amici curiae* devote two pages of their brief to a discussion of a recent decision by the Arkansas Supreme Court, *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992). Fretwell's *amici curiae* brief at 14-5. Fretwell's *amici curiae* cite *Johnson* for the proposition that the Arkansas Supreme Court itself has stated that Arkansas' death penalty sentencing procedure carries out the genuine narrowing required by the Eighth Amendment at the penalty stage of capital murder trials, rather than at the definitional stage of capital murder. *Johnson*, 308 Ark. at 16, 823 S.W.2d at 805. Lockhart submits that the discussion by the Arkansas Supreme Court in *Johnson* of Arkansas' death penalty sentencing procedure is inapposite to the instant case. *Johnson* did not involve the capital offense of robbery-murder but involved, instead, the capital offense of the premeditated and deliberated killing of a single victim. As the Arkansas Supreme Court notes in *Johnson*, the premeditated and deliberated killing of a single victim was not even defined as capital murder in Arkansas until 1989. *Johnson*, 308 Ark. at 15-6, 823 S.W.2d at 805. Lockhart would concede that for defendants who are convicted of capital murder on a theory of killing a single victim with premeditation and deliberation, the genuine narrowing required by the Eighth Amendment would occur at the penalty phase of the defendant's trial, where, pursuant to the weighing component of Arkansas' death penalty sentencing procedure, the jury would find if any

aggravating circumstances exist beyond a reasonable doubt and then would weigh them against any mitigating circumstances found to exist in order to determine if the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. In any event, the instant case does not involve the theory of capital murder set forth in *Johnson*, the premeditated and deliberated killing of a single victim, and this definition of capital murder did not exist in 1985 when Fretwell committed the robbery-murder at issue.

D. The "Weighing" Element of Arkansas' Death Penalty Sentencing Procedure Has No Bearing on Whether the Definition of Felony-Murder Set Forth in Arkansas Statute Annotated § 41-1501(1)(a) Genuinely Narrows the Set of All Murderers Down to a Subset That Truly Deserves To Die.

Both Fretwell and his *amici curiae* make must- of the fact that Arkansas has a "weighing" component in its death penalty sentencing procedure. In 1985 and also today Arkansas requires that jurors who are deliberating whether to impose the death penalty on a defendant weigh the aggravating circumstances present against any mitigating circumstances present and also requires that the jurors conclude that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. Arkansas Statute Annotated 41-1302(1)(b) (1977) (presently codified as Arkansas Code Annotated § 5-4-603(a)(2) (Supp. 1991)). Fretwell's *amici curiae* devote a great deal of argument to this point using this Court's recent decision in *Stringer v. Black*, 503 U.S. ——, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) as the spearhead of their attack. Fretwell's *amici curiae* brief at 25-29.

In *Stringer v. Black* the issue was whether this Court's decisions in *Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Clemons v. Mississippi*, 494 U.S. 738 (1990) established a "new rule" for purposes of the application of the

retroactivity doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989) with regard to the claim by a Mississippi death row inmate that his death sentence was invalid because the jury that sentenced him to death had weighed an invalid aggravating circumstance. In *Stringer v. Black* this Court held that *Maynard v. Cartwright* and *Clemons v. Mississippi* did not establish a "new rule" for *Teague v. Lane* retroactivity purposes and, therefore, the defendant's death sentence was violative of the Eighth Amendment because the jury had weighed an invalid aggravating circumstances. In its opinion in *Stringer v. Black* this Court noted that the issue present in the case had little to do with the "genuine narrowing" issue that was decided in *Lowenfield v. Phelps*. *Stringer v. Black*, 112 S.Ct. at 1139, 117 L.Ed.2d at 382. Lockhart makes the same observation about the argument based on *Stringer v. Black* presented by Fretwell's *amici curiae*— it has very little to do with the Eighth Amendment genuine narrowing issue that is before the Court in the instant case.

The "weighing" component of the various capital punishment sentencing procedures that were at issue in *Stringer v. Black* and this Court's prior decisions leading to *Stringer v. Black* were the focus of Eighth Amendment analysis by this Court solely because the jurors' weighing of aggravating circumstances in the respective cases was alleged to be violative of the Eighth Amendment because, in each case, the jury had considered an invalid aggravating circumstance. The invalid aggravating circumstance at issue in *Stringer v. Black*, in *Maynard v. Cartwright* and in *Clemons v. Mississippi* was the aggravating circumstance of "especially heinous, atrocious, or cruel." In *Maynard v. Cartwright* this Court had held that this aggravating circumstance was invalid because it was so vague that a person of ordinary sensibility could find the aggravating circumstance present in almost every murder. *Maynard v. Cartwright*, 486 U.S. at 363-64. Whatever else they have had to say about

the aggravating circumstances of "pecuniary gain," the aggravating circumstance involved in the instant case, neither Fretwell nor his *amici curiae* has stated that pecuniary gain was so vague that a person of ordinary sensibility could find it present in almost every murder.

If, as Lockhart contends, the statutory definition of robbery-murder set forth in Ark. Stat. Ann. § 41-1501 (1)(a) performs the genuine narrowing required by the Eighth Amendment, then the "weighing" component of Arkansas' death penalty sentencing procedure is not tainted. If the statutory definition of robbery-murder performs the genuine narrowing required by the Eighth Amendment, then "pecuniary gain" is a valid aggravating circumstance. If valid aggravating circumstances are weighed by the jury, then *Stringer v. Black* and this Court's prior decisions leading to it are not applicable.

E. Pecuniary Gain Is Not an Element of Arkansas' Definition of the Offense of Robbery.

In the brief filed by Fretwell's *amici curiae*, they state that "pecuniary gain" is an element of the offense of robbery and, therefore, is an element of the capital felony murder offense of robbery-murder. This assertion by Fretwell's *amici curiae* is incorrect. The Arkansas Supreme Court has never interpreted the offense of robbery to require evidence of "pecuniary gain" to prove the statutory elements of robbery. In 1985 (and today) Arkansas defined robbery in Ark. Code Ann. § 5-12-102(a) (1987) as follows:

> A person commits robbery if, with the purpose of committing a theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

The Arkansas Supreme Court has consistently interpreted this statutory definition of robbery not to require proof by the State that the defendant ever actually took property from the victim and has consistently held that the

offense is complete when the defendant employs or threatens to employ physical force. *Birchett v. State*, 294 Ark. 176, 180-81, 741 S.W.2d 267, 270 (1987); *Novak v. State*, 287 Ark. 271, 273-74, 698 S.W.2d 499, 501 (1985); *Mitchell v. State*, 281 Ark. 112, 661 S.W.2d 390 (1983); and *Higgins v. State*, 270 Ark. 19, 603 S.W.2d 401 (1980). Synthesis of the *Birchett-Higgins* line of cases proves that in 1985 (and today) pecuniary gain was not an element of Arkansas' statutory definition of robbery; therefore, pecuniary gain was not an element of the crime of robbery-murder in 1985 (and is not today). To prove that the defendant committed robbery-murder, the state would have to prove robbery—to do so it would not have to prove that the defendant realized a pecuniary gain.

Pecuniary gain, clearly understood, was (and is) a motive for robbery-murder rather than an element of the offense itself. Pecuniary gain's true nature, as a motive for robbery-murder rather than an element of the crime, can be seen if one considers the hypothetical situation of two sisters, one of whom murders the other in order to take away from the victim a family heirloom prized for its sentimental value but of no pecuniary value, in the sense of market value, whatsoever. In this hypothetical case, murder was committed to facilitate a robbery for gain, but the gain was not a pecuniary gain. To convict the hypothetical sister of robbery-murder, the state would not be *required* to prove her motive, pecuniary or otherwise. *See Still v. State*, 294 Ark. 117, 740 S.W.2d 926 (1987) and *Ederington v. State*, 244 Ark. 1096, 1104, 428 S.W.2d 271, 275 (1968).

Lockhart concedes that pecuniary gain is a common motive for robbery but it is not the only conceivable motive for robbery. For example, a defendant convicted of robbery-murder could argue to the jury that he did not commit the offense in order to realize a pecuniary gain, but instead committed the offense because a complex interweaving of deep-seated psychological and social factors

compelled him to commit robbery in order to achieve a sense of well-being arising from domination over and control of a helpless victim. *See* John Conklin, *Robbery and the Criminal Justice System*, 79-80 (1972) and Jack Katz, *Seductions of Crime*, 218-36 (1988). On the basis of expert testimony, such a robber-murderer could plausibly argue in the penalty phase of capital felony murder trial that he did not commit the robbery-murder at issue in order to realize a pecuniary gain, but did it, instead, to satisfy a psychological need.

In summary, Fretwell's *amici curiae* simply are incorrect when they assert that pecuniary gain is an element of the offense of robbery as defined in Arkansas. Pecuniary gain is not an element of robbery and, therefore, is not an element of the offense of robbery-murder. Because pecuniary gain is not an element of the offense of robbery-murder it is not an automatic aggravating circumstance in every robbery-murder case—a jury must find that the aggravating circumstance of pecuniary gain exists beyond a reasonable doubt, and the jury is not required to do so.

CONCLUSION

The United States Eighth Circuit Court of Appeals' holding in the instant case that respondent Fretwell suffered a deprivation of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial in Searcy County Circuit Court is based on an incorrect interpretation of these Amendments to the United States Constitution and should be reversed by this Court. Petitioner Lockhart respectfully requests that this Court reverse the holding of the Eighth Circuit Court of Appeals in the instant case and, in so doing, hold that respondent Fretwell was not deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel at the penalty phase of his capital felony murder trial in Searcy County Circuit Court. Petitioner Lockhart respectfully requests

further that this Court deny respondent Fretwell any relief whatsoever.

Respectfully submitted,

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